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Private Law: Insurance

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CORPORATIONS

Milton M. Harrison*

In *Scobee v. Continental Hotel Corp.*,¹ one of the incorporators subscribed to fifty percent of the shares of the corporation, and the articles of incorporation recited that he was the owner of the shares. However, no payment for the shares was made and the other principal shareholder and incorporator assumed complete control of the corporation and considered himself one hundred percent owner. After several years, petitioner sought a writ of mandamus to compel the corporation, its president, and secretary to deliver a certificate of stock evidencing petitioner's ownership of fifty percent of the stock. The court held that in the absence of having followed the procedure provided by statute² for disposing of subscriber's stock when payment is not made, the subscriber continues to be owner of the shares and is entitled to have the certificate delivered to him, upon making payment therefor.

It is required by statute that when parole evidence is admissible, "the debt or liability of the deceased must be proved by the testimony of at least one creditable witness other than the claimant. . . ."³ In *B. Stern Co. v. Perry*,⁴ the court held that testimony of the vice president of the corporation was the testimony of the corporation (the claimant) and was not that of one creditable witness other than the claimant; thus, the statutory requirement of proof was not met.

INSURANCE

W. Shelby McKenzie*

Insurance on Property

The statutory fire policy provides that no suit shall be sustainable "unless commenced within twelve (12) months next after inception of the loss." In *Finkelstein v. American Insurance Co. of Newark*,¹ the supreme court had held that the twelve

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1. 242 So.2d 610 (La. App. 1st Cir. 1970).

2. LA. R.S. 12:6 (1950); the same provision since the 1968 revision of Title 12 is LA. R.S. 12:71 (Supp. 1968).

3. LA. R.S. 13:3722 (Supp. 1960).

4. 246 So.2d 246 (La. App. 1st Cir. 1971), *rehearing denied*, April 19, 1971.

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1. 222 La. 516, 62 So.2d 820 (1952).

month period did not commence to run until "after ascertainment of the loss" as provided in the policy either by agreement or by appraisal. The *Finkelstein* case not only unnecessarily distorted the policy language, but also virtually wrote prescription out of the policy since "ascertainment of the loss" was the very thing which is not done with neglected claims.

In *Gremillion v. Travelers Indemnity Co.*,² the Louisiana Supreme Court expressly overruled the *Finkelstein* case, holding that "inception of the loss" means what it says—that is, the date the loss occurs. Noting that the language of the statutory fire policy was that of the legislature and not the insurance company, the court found the legislative intent clearly expressed. The court in *Gremillion* further found that there had been no action by the insurer constituting a waiver of prescription, nor had the company lulled the insured into a false belief that he would be paid. The court thus clearly retained the tools necessary to permit recovery in any case in which there has been reprehensible conduct by the insurer. In recognizing the weakness of the *Finkelstein* decision and accordingly overruling it, the supreme court in *Gremillion* re-establishes a workable rule of prescription in harmony with the plain policy language. Although insurance policies are to be liberally construed in favor of the insured, obvious distortion of policy provisions under the guise of interpretation is not warranted whether the policy language is conventional or statutory.

Gibbsland Supply v. American Employers Insurance Co.,³ is the first state court case to pass squarely on the issue whether, in the event of a partial loss to immovable property under a fire policy, the insured is entitled to the full cost of repair or whether the insurer is entitled to deduct depreciation. The court found that the cost of repair was approximately \$8,000, and the insurer contended that it was entitled to deduct \$2,000 as "betterment." The court held that any pertinent policy language was subject to R.S. 22:695, commonly known as the "Valued Policy Law." In the case of partial damage, Subsection B provides that the insurer shall pay to the insured such amount "as will permit the insured to restore the damaged property to its original condition." In the only prior case dealing squarely with this provision,

2. 256 La. 974, 240 So.2d 727 (1970).

3. 242 So.2d 310 (La. App. 2d Cir. 1970), *writ refused*, 257 La. 987, 244 So.2d 858 (1971).

the United States Court of Appeals on *Reliance Insurance Co. v. Orleans Parish School Board*,⁴ held that replacement-cost-less-depreciation was the standard to be applied. The *Gibbsland* court flatly rejected the federal court holding and ruled that the statute does not permit deduction of depreciation. Thus, the insured was permitted to recover the full cost of repair. "Original condition" is an ambiguous phrase; if another result were intended, the statute requires legislative clarification.

In first party claims, the insured and the insurer often agree that a certain portion of the alleged loss is owed, and the real dispute concerns only the remainder of the claim. In their eagerness to dispose of the entire claim, insurers occasionally fail or refuse to pay the undisputed portion timely. Two recent cases again emphasize that there is no legal justification for the insurer to withhold the agreed portion of the loss, and the undisputed amount must be tendered timely to avoid the statutory penalties and attorneys' fees.⁵

Insurance on the Person

In *Hammond v. National Life & Accident Insurance Co.*,⁶ the plaintiff brought suit for accidental death benefits on a policy suspending coverage "in time of war." The insured died in a fire aboard the aircraft carrier *Oriskany* in the Gulf of Tonkin while serving as a lieutenant in the United States Naval Reserve. Finding that there had been no formal declaration of war in the Viet Nam conflict, the court held that the exclusionary provision was not applicable. The issue was *res nova* in Louisiana, and there was conflicting jurisprudence from other jurisdictions. The court relied on a Pennsylvania case⁷ concerning the Korean Conflict which observed that our military forces have been engaged in more than 150 various conflicts in other countries. To include within the definition of "war" any hostility other than that formally declared by Congress would leave an insured without any definite and uniform standard.

Liability and Related Coverages

Most policies with uninsured motorist benefits provide dollar

4. 322 F.2d 803 (5th Cir. 1963).

5. *Spano v. Emmco Ins. Co.*, 239 So.2d 434 (La. App. 4th Cir. 1970); *Benoit v. American Mutual Ins. Co.*, 236 So.2d 674 (La. App. 3d Cir. 1970).

6. 243 So.2d 902 (La. App. 3d Cir. 1971).

7. *Beley v. Pennsylvania Mutual Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202 (1953).

for dollar credit for amounts received by an insured as workmen's compensation benefits. Application of the credit provision was approved in *Allen v. United States Fidelity & Casualty Co.*⁸ In *Williams v. Buckelew*,⁹ however, the court took an about-face, accepting the argument that such a credit provision was in direct conflict with R.S. 22:1406 which requires certain minimum limits of uninsured motorist coverage. *Allen* was expressly overruled to the extent that it permitted reduction of the statutory minimum limits.

The workmen's compensation carrier is not subrogated to the insured's right to receive benefits under the uninsured motorist coverage. Therefore, the plaintiff in *Williams* was permitted to recover the full uninsured motorist limits plus his full workmen's compensation benefits. Good arguments can be mustered to support both the *Williams* and *Allen* positions. The result in *Williams* is not offensive because the value of the plaintiff's serious injuries exceeded the sum of both his workmen's compensation and uninsured motorist recoveries. However, if the *Williams* holding is extended to include claims valued at less than this sum, the insured is given a "double" recovery which does not appear to be the intent of the statutes requiring uninsured motorist coverage.

In *Deshotel v. Travelers Indemnity Co.*,¹⁰ the court permitted a direct action by the father against his son's insurer. The court expressed no opinion as to whether public policy would dictate an immunity for the son from a suit by the father, holding that such immunity would be personal to the son and could not be pleaded by his insurer. This holding is consistent with the prior jurisprudence which recognizes that the insurer sued directly may plead only general defenses and not the personal immunities of its insured.¹¹

As long as it acts in good faith and the settlements are reasonable, an insurer faced with multiple claimants and inadequate policy limits may settle with some of the injured persons, thereby depleting or exhausting the funds available for other claimants.¹²

8. 188 So.2d 741 (La. App. 2d Cir. 1966), *writs refused*, 249 La. 743, 190 So.2d 909.

9. 246 So.2d 58 (La. App. 2d Cir. 1970).

10. 257 La. 567, 243 So.2d 259 (1971).

11. *E.g.*, *Edwards v. Royal Indem. Co.*, 182 La. 171, 161 So. 191 (1935).

12. *Richard v. Southern Farm Bureau Cas. Ins. Co.*, 254 La. 429, 223 So.2d 858 (1969).

In *Jack v. Jack*,¹³ the plaintiff contended that the insurer must bear the burden of proving that its settlements were reasonable and made in good faith. The court flatly rejected this contention, placing the burden squarely upon the plaintiff attacking the settlements.

Recently, there has arisen a conflict between primary and excess insurers over the question whether the primary insurer is obligated to defend the excess insurer when both carriers are joined in the suit. The issue now seems well settled that the primary insurer has no obligation to defend the excess carrier.¹⁴

PUBLIC LAW

ADMINISTRATIVE REGULATION: LAW AND PROCEDURE

*Melvin G. Dakin**

PUBLIC SERVICE COMMISSION

In *Truck Service Inc. v. Louisiana Public Service Commission*,¹ an application for contract carriage of certain steel products was granted with modifications. A motor carrier having common carrier authority from the commission intervened in the proceeding and opposed the application on the ground that existing common carrier service was adequate to serve the shipper. The applicant sought to show an inadequacy in present service by evidence that it was not economical for a common carrier to maintain the necessary trucks or trailers readily available for shipper's exclusive use. The applicant also showed that the common carrier had only intrastate authority and that interline connections would be required if the traffic were to be handled by the common carrier. Special need was allegedly shown by evidence that these disadvantages would be remedied by the contract carrier. Our supreme court affirmed the granting of the application by the commission. In doing so it alluded to the United States Supreme Court holding in *I.C.C. v. J. T. Transport Co.*,² and noted that:

13. 240 So.2d 435 (La. App. 3d Cir. 1970).

14. *Lumberman's Mutual Cas. Co. v. Connecticut Fire Ins. Co.*, 239 So.2d 472 (La. App. 4th Cir. 1970); *Fusilier v. Dixie Auto Ins. Co.* 238 So.2d 223 (La. App. 3d Cir. 1970).

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1. 256 La. 343, 236 So.2d 491 (1970).

2. 368 U.S. 81 (1961).